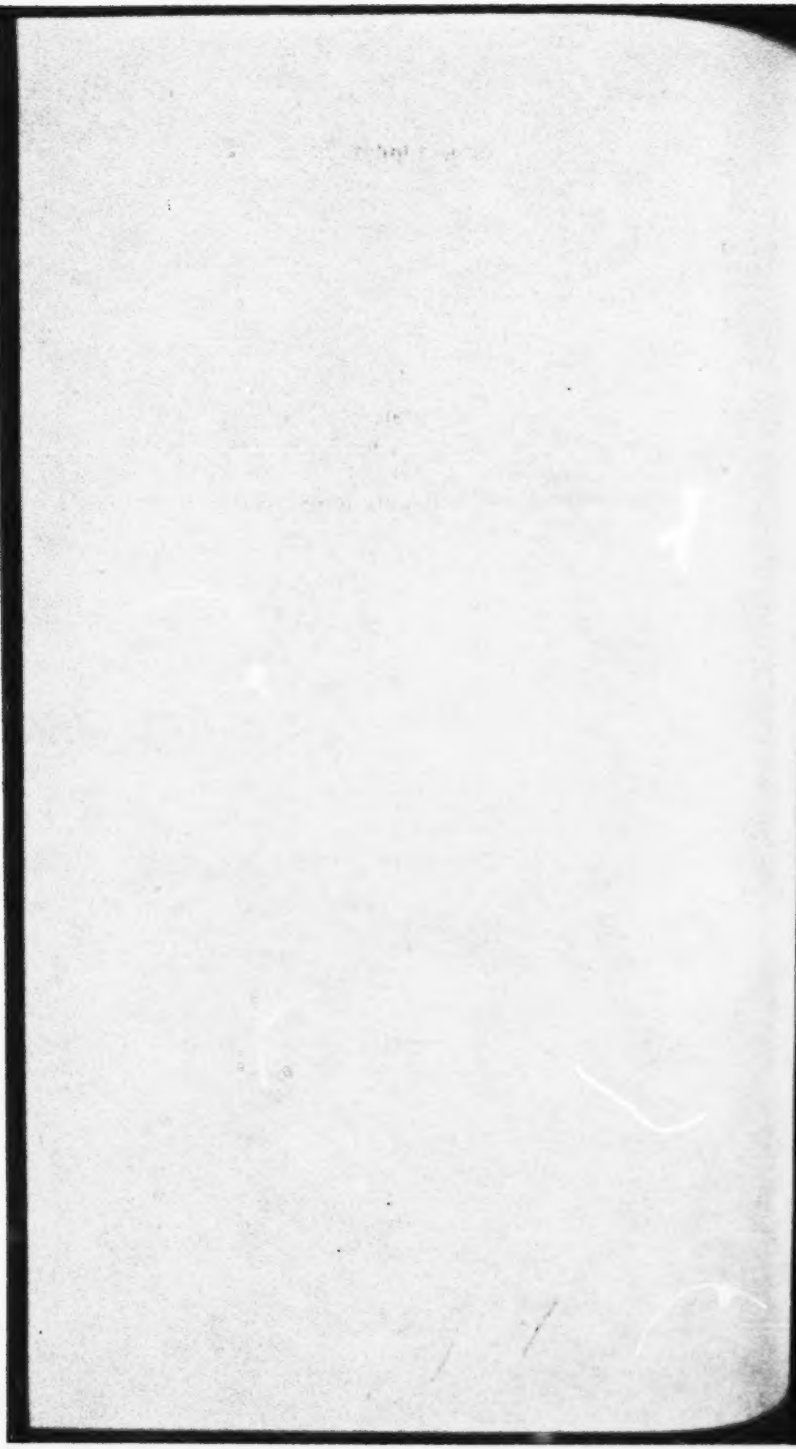

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-324

THE PEOPLE OF THE STATE OF CALIFORNIA, and the CLASS OF COUNTY CLERKS and REGISTRARS OF VOTERS OF CALIFORNIA, *Petitioners,*

vs.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7TH STEP FOUNDATION, INC. (CALIFORNIA AFFILIATES), PRISONERS' UNION, THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, and EDMUND G. BROWN, JR., Secretary of State of the State of California, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, individually and on behalf of a

class of over 100,000 previously disfranchised California electors, respectfully pray, for the reasons expressed herein, that the petition for writ of certiorari be denied. Furthermore, pusuant to Rule 24(2) of this Court, respondents object to the California Attorney General's attempt to invoke this Court's jurisdiction and hereby move that his petition be dismissed.

QUESTIONS PRESENTED

1. Whether non-parties to a judgment by the California Supreme Court, declaring unconstitutional the unequal application of California's voting laws, may properly petition this Court for a writ of certiorari.

2. Whether the denial of the right to vote, through the unequal application of California's voting laws, violates the principles of equal protection.

STATEMENT OF THE CASE

Article II, Section 3 of the California Constitution denies suffrage to those who have been convicted of "infamous crimes". In 1966, the California Supreme Court interpreted Article II, Section 1 and related constitutional and statutory provisions to exclude from the voting rolls only those ex-felons who had been convicted of crimes which threatened "the purity of the ballot box". *Otsuka v. Hite,* 64 Cal.2d 596 (1966). Following that decision, California's 58 Registrars of Voters established 58 separate and often inconsistent

policies as to which of California's several hundred felonies were "infamous crimes" and which were not.

Because of the peculiar nature of the petition filed by the Attorney General of California, Respondents have set forth in detailed chronological order both the proceedings below and in this Court.

1] Having been denied registration solely because of their felony convictions, Respondents, Ramirez, Gill, and Lee, sought an original writ of mandate in the California Supreme Court on behalf of themselves and those California ex-felons whom they represented[1] to require California's Chief Election Officer, the Secretary of State, and all of California's 58 County Registrars to register those ex-felons whose terms of incarceration and parole had expired.[2] The original jurisdiction of the California Supreme Court was invoked because of the state-wide impact of the questions involved and the then impending national elections. *Ramirez v. Brown,* 9 Cal.3d 199, 202-203 (1973).

2] The petition in *Ramirez v. Brown, supra,* named as respondents the Secretary of State of California and three County Clerks, individually and as

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[1]Other named Respondents are three non-profit organizations whose members are directly adversely affected by ex-felon disfranchisement, and the California League of Women Voters, a non-profit California corporation whose purpose is to promote active citizen participation in government. Edmund G. Brown, Jr., Secretary of State of the State of California, a respondent in the original action in the California Supreme Court, has been named a respondent herein by the Attorney General.

[2]As requested by petitioners below, the opinion in *Ramirez v. Brown* is specifically limited to those ex-felons whose terms of incarceration and parole have been completed. 9 Cal.3d at 217, n. 18.

representatives of the Class of all County Clerks and Registrars of Voters.[3] The three County Clerks were Ernest Maggini, County Clerk for the County of Monterey, Ruth Warnken, County Clerk of San Luis Obispo, and Mervin Mattos, Registrar of Voters of Stanislaus County. These three County officials had denied registration to petitioners Lee, Ramirez, and Gill respectively.

3] None of the three respondent County Clerks chose to contest the Petition below. Ernest Maggini and Ruth Warnken separately filed returns to the Alternative Writ issued by the California Supreme Court advising that said respondents thereupon were commencing and continuing to register all ex-felons whose terms of incarceration and parole had expired and who, upon application, demonstrated that they were otherwise fully qualified to vote. *Ramirez v. Brown* at 203. The third County respondent, Mervin Mattos, filed no response to the Petition and made no appearance. Petition, p. 7.

4] Viola N. Richardson, Clerk and Registrar of Voters of Mendocino County, a member of the class of respondents below, petitioned the California Supreme Court for leave to intervene in the original action. Because Mrs. Richardson was a member of the class of County Clerks and Registrars of Voters, the Court allowed her to appear as an individual respondent. The District Attorney of Mendocino County

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[3]Actions against defendants representative of a class may be maintained under California law. California Code of Civil Procedure Section 382. *Mitchell v. Pacific Greyhound Lines*, 33 C.A.2d 53, 91 P.2d 176 (1939).

appeared on behalf of Mrs. Richardson and urged the California Supreme Court to maintain the disfranchisement of all former felons based on the principle of maintaining the "purity of the ballot box". Motion to Intervene below, pages 8-9.

5] The Attorney General of California appeared on behalf of the Secretary of State, Edmund G. Brown, Jr. The Attorney General indicated to the California Supreme Court at oral argument that he represented the Secretary of State and that he also had an "interest" of his own in the case. The transcript of the Attorney General's oral argument appears in the Appendix hereto. The Attorney General stated to the Court that his position was the same as that of the Secretary of State. Appendix pp. i, iv. Both the Secretary of State and the Attorney General agreed with petitioners below that petitioners and their class should not be denied their right to vote as long as they had completed their terms of incarceration and parole. Appendix pp. i-iv. The Attorney General, as he has stated in the Petition herein at page 5, also admitted to the Court in oral argument that the state-wide disparity in the application of California's voting laws was clearly unconstitutional. He stated:

> "I think there's no question you have the geographical denial of equal protection on that ground." (Appendix p. iv).

The Attorney General concluded his oral argument by indicating to the Court that if it was going to limit its decision to restoring the right to vote to the class

of former-felons not presently on parole, he agreed with such a decision. Appendix p. ix.

6] Respondents presented the California Supreme Court with data showing the state-wide geographical disparities in application of the "infamous crime" standard. The Attorney General provided additional examples at oral argument.[4] In reviewing the evidence presented, the California Supreme Court held in a unanimous decision on March 30, 1973, that the disfranchisement of ex-felons who were not then incarcerated or on parole was no longer constitutionally permissible in California.

7] On May 26, 1973, the County Clerk and Registrar of Voters for Mendocino County, Viola N. Richardson, filed a Petition for a Writ of Certiorari from the judgment in *Ramirez v. Brown. (Richardson v. Ramirez,* October Term No. 72-1589). That petition was brought by Viola N. Richardson "individually and as a representative of the class of all other County Clerks and Registrars of Voters" and awaits determination by this Court. Respondents have filed their Brief in Opposition to that Petition.

8] The Attorney General of California, 85 days after the decision in *Ramirez v. Brown,* filed an "Application for Extension of Time in Which to File Petition for Writ of Certiorari" on behalf of "The Peo-

[4]The Attorney General set out two examples of the administrative discretion under *Otsuka v. Hite, supra,* that led to the unequal application of the law. In Los Angeles, statutory rape was a disfranchising crime while ordinary rape was not, and a conviction of possession of marijuana under State law was a disfranchising offense but the same conviction under Federal law was not. Appendix pp. iv-v.

ple of the State of California (a non-party); Ernest Maggini, County Clerk of the County of Monterey; Steve R. Nelson, County Clerk and ex-officio Registrar of Voters of Stanislaus County; Ruth Warnken, County Clerk of San Luis Obispo County (all of whom declined to appear in the California Supreme Court); individually and as representatives of the class of all other County Clerks and Registrars of Voters of California."[5]

9] Pursuant to that extension order, on August 20, 1973, the Attorney General of California filed this Petition for Writ of Certiorari from the judgment in *Ramirez v. Brown* with two noticeable changes. First, the Secretary of State, the Attorney General's client below, was made a respondent, but more importantly, the Attorney General proposed to the Court that he was no longer petitioning on behalf of the three named individual county registrars but rather on behalf of (a) "The People of the State of California" and (b) the "Class of County Clerks and Registrars of Voters of California."

[5]That application was considered and an order was issued on July 2, 1973, extending time for filing the petition for Writ of Certiorari to and including August 27, 1973.

ARGUMENT

I

NEITHER "THE PEOPLE OF THE STATE OF CALIFORNIA", A NON-PARTY TO THE JUDGMENT BELOW, NOR "THE CLASS OF COUNTY CLERKS AND REGISTRARS OF VOTERS OF CALIFORNIA", WITHOUT AN INDIVIDUAL REPRESENTATIVE, ARE PROPER PARTIES TO PETITION FOR A WRIT OF CERTIORARI.

A.

The Attorney General of the State of California Cannot Invoke the Jurisdiction of This Court on Behalf of a Petitioner That Was Not a Party to the Judgment Below.

California's Attorney General has postured this petition in a most unusual and strained manner. The rules of this Court clearly set forth special provisions for the protection of both state and federal government interests where the government was not a party to a judgment petitioned from. Rule 42(4). The Attorney General, however, has attempted to petition this Court for a writ of certiorari on behalf of a petitioner that was not a party below, "The People of the State of California".

The attempted filing of the petition by the Attorney General on behalf of The People of California was clearly improper. Although Rule 21(4) of this Court allows "all parties" to the proceedings below to be deemed parties in this Court, "The People of the State of California" were not a party to the record and judgment below. *Ramirez v. Brown, supra.* They are therefore not entitled to seek review of the decision in *Ramirez* by way of a petition for writ of certiorari. *In re Leaf Tobacco v. Board of Trade,* 222 U.S. 578 (1911).

Recognizing this error, the Attorney General, on August 29, 1973, stated in a letter to the Court that "The People of the State of California," in fact, had not been a party below, and amended the petition to include *only* the "Class of County Clerks and Registrars of Voters of California" as petitioner.[6]

B.

The "Class of County Clerks and Registrars of Voters of California", Being a "Class" Without a Representative Individual Member is not a Proper Party to This Petition.

The Petitioner is now presented as simply "The Class of County Clerks and Registrars of Voters of California." It is clear under both State law and the Federal Rules of Civil Procedure that the entity of a "class" cannot be a party without being represented by at least one individual member who will represent the class interest. It is not enough that there is an attorney willing to represent a client, there must be in fact a party who seeks his interest and those of his class protected. California Code of Civil Procedure, Section 382, Fed. R. Civ. P. 23.

However, assuming the "class" was entitled to petition for a writ of certiorari without being represented by an individual member, still another fatal procedural defect is present. The "class", as the "petitioner" it is now portrayed to be, did not appear below as a separate party. Petition, page 7. Under such a posture, the "class" herein would thus be a peti-

[6]Letter dated August 29, 1973, to the Honorable Michael Rodak, Jr., Clerk of the Court, from Evelle J. Younger, Attorney General, by George J. Roth, Deputy Attorney General.

tioner who not only failed to raise and preserve the present issues below, but in fact defaulted by not appearing at all.

An established principle of appellate review is that review of a question will be denied to a party failing to raise and preserve that question in the lower court. *United States v. Donnelly's Estate,* 397 U.S. 286 (1970). That rule has been applied to a party who fails to raise a federal question in state court even where a co-party has successfully raised the question. *Puget Sound Power and Light Company v. King County,* 264 U.S. 22 (1924); *Sully v. American National Bank,* 178 U.S. 289 (1900). As this Court stated in *Sully:*

> "However it may be in regard to the rights of parties on appeal in the state court, we think that, in order to be heard in this court, the question must have been raised in the state court by the individual who seeks to have it reviewed here. A plaintiff in error in this court must show that *he has himself* raised the question in the state court which he argues here; and it will not aid him to show that *someone else* has raised it in the state court, while he failed himself to do so." 178 U.S. at 297. (Emphasis added).

Thus, where a co-party may be barred from raising a tardy constitutional challenge, then *a fortiori,* a respondent that fails to appear at all may not later petition for a writ of certiorari. The "Class of County Clerks and Registrars", therefore, either cannot now be heard because it is without an individual representative or alternatively because it failed to contest

the decision below. It is respectfully submitted that the petition should be dismissed as having been filed on behalf of an improper party.

C.

This Petition for Writ of Certiorari Was Not Timely Filed Because the Extension of Time to File the Petition Was Obtained on Behalf of Petitioners Who Were Neither Parties Below Nor Now Before the Court.

The petition now docketed no longer names as petitioners the State of California or the three individuals previously named as representatives of the class of County Clerks and Registrars. Ernest Maggini, Steve R. Nelson, and Ruth Warnken, County Clerks and Registrars of Monterey, Stanislaus and San Luis Obispo Counties, *were* named by the Attorney General in his request for an extension of time in which to file the petition, however. In the California Supreme Court, each named County Clerk had "decided not to contest the issue" and advised the California Supreme Court that they would register all former-felons who were otherwise qualified to vote. *Ramirez* at 203. The three named Clerks had removed themselves as parties below and are not proper parties to a petition for writ of certiorari from that judgment. *In re Leaf Tobacco, supra.* They therefore were not proper parties to the application for extension of time for filing submitted in their names by the Attorney General. Recognizing this error, after having obtained the 60-day extension in their names, the Attorney General did not name them as petitioners. Instead, the petition herein was filed on behalf of "The People of the State

of California" and the "Class of County Clerks and Registrars of Voters." The petition ultimately docketed states that "The real party in interest" is the People of California, whom the Attorney General has since conceded was not a party below and has voluntarily removed from the petition. Petition, page 9.

The deletion of the Attorney General's "real party in interest" *and* the three named individual members of the class means, at least, that the application for extension of time for filing does not apply to the petition now before the Court. As a result the petition was not timely filed. It is respectfully submitted that on that ground alone, this petition should be dismissed.

D.

The Present "Class" May Not Petition For a Writ of Certiorari Because It Has Already Done So In Richardson v. Ramirez.

Assuming that the "Class of County Clerks and Registrars of Voters of California" is a proper petitioner for a Writ of Certiorari, that same petitioner has already pending before this Court a petition for Writ of Certiorari from the same judgment below. In *Richardson v. Ramirez,* October Term No. 72-1589, the County Clerk and Registrar of Voters for the County of Mendocino, Viola N. Richardson, "individually and as a representative of the class of all other County Clerks and Registrars of Voters" petitioned this Court for a Writ of Certiorari from the judgment in *Ramirez v. Brown, supra.* The Attorney General cites no authority to support the maintenance of what is in effect a second and identical petition. No facts are

alleged in this petition to differentiate it from that in No. 72-1589. No allegation is made that there is any difference in the interests of petitioner Richardson and the class she represents and the "petitioner" herein. No reason for believing that the issues were not adequately set forth by petitioner Richardson in No. 72-1589 have been presented in this petition. Indeed, "petitioner" herein cites not one authority not presented by petitioner Richardson.

Moreover, Rule 23(5) of this Court indicates that where "*several* cases are sought to be reviewed on certiorari to the same court that involve *identical* or closely related questions, it shall suffice to file a *single* petition for writ of certiorari covering all the cases." [Emphasis added]. In the present instance there is only *one* case sought to be reviewed, the issues are by definition *identical* as to that case and the two petitions now on file. Clearly, the maintenance of these two separate petitions is contrary to the rules of this Court. It is respectfully submitted that this petition should therefore be dismissed.

E.

A Request to File an Untimely Amicus Curiae Brief Submitted by a Party to a Pending Petition for a Writ of Certiorari Should Not Be Granted.

The Attorney General of California has requested that if his Petition for Writ of Certiorari on behalf of the "Class of County Clerks and Registrars of Voters" is denied, that it then be treated as an amicus curiae brief in support of the Petition for Writ of Certiorari in the case of *Richardson v. Ramirez*, Oc-

tober Term, No. 72-1589.[7] Transforming the Attorney General's certiorari petition into an amicus petition does not cure its defects. The "amicus" is purportedly filed on behalf of "The Class of County Clerks and Registrars," the very same party which has filed the petition in No. 72-1589. Surely a party cannot be both a petitioner and an amicus in the same case. Moreover, the amicus request, insofar as it is purportedly on behalf of "The People of the State of California," filed some five months after the judgment below and over 90 days after the docketing of the case, is not timely filed as required by Rule 42(1). This request should therefore not be granted.

II

IN VIEW OF THE FACTS PRESENTED TO THE COURT BELOW, THE CALIFORNIA SUPREME COURT PROPERLY HELD THAT DISFRANCHISEMENT OF EX-FELONS IN CALIFORNIA IS A DENIAL OF EQUAL PROTECTION OF THE LAWS.

In *Ramirez v. Richardson,* October Term No. 72-1589, respondents set out in eleven printed pages and in an eight page appendix their arguments in opposition to the writ of certiorari and in favor of sustaining the decision of the California Supreme Court. With this Court's permission and indulgence, those arguments are not again set out herein, but are in-

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[7]Letter dated August 29, 1973, to the Honorable Michael Rodak, Jr., Clerk of the Court, from Evelle J. Younger, Attorney General, by George J. Roth, Deputy Attorney General.

corporated by reference. In summary, the relevant points are:

[A] The California Supreme Court, faced with a pattern of unequal application of the vague "infamous crime" standard found in the California Constitution, decided the issue in this case on a series of facts unique to California. A survey conducted by California's Secretary of State in early 1972 showed that the term "infamous crime" was interpreted by each County Registrar on an ad hoc basis, resulting in a hodge-podge of rules and standards. For example, a person convicted of burglary who had been released from prison and parole was registered and permitted to vote if he lived in Alameda, Contra Costa, Fresno, Marin, San Joaquin, Sonoma, and Yuba Counties. He was denied registration if he lived in El Dorado, San Bernardino, and Santa Cruz Counties. Similarly, at least eight counties (Yolo, Sonoma, Santa Clara, San Francisco, San Diego, Sacramento, Contra Costa, and Alameda) would have registered a robbery ex-felon whereas seven others (Siskiyou, Santa Cruz, San Joaquin, San Bernardino, Orange, Monterey and Los Angeles) would not. Twenty-one counties indicated they would register an ex-felon convicted of possession of dangerous drugs, but not use or sale of drugs. Other counties would register the former felon in the case of either possession or use, but not sale of drugs. At least another nine counties registered those convicted of any of the three.

As a result of these disparate practices, the California Supreme Court re-examined the purpose and

meaning of the "infamous crime" restriction. It found that whereas voter fraud was rampant in 1849 when the Constitution was adopted, voting fraud in California today is not a realistic possibility. The last reputed case of vote buying in California occurred in 1908. The Los Angeles County Registrar of Voters has not received a complaint of voter irregularity for the past 41 years. As the California Supreme Court stated:

> "To do so [influence the outcome of an election in California] if possible at all, would require the coordinated skills of a vast squadron of computer technicians." 9 Cal.3d at 214.

Moreover, the Court below found adequate statutory deterrents to fraud in California statutes. The Court stated:

> "The first election law denominated only eight offenses against the franchise, and all were punishable as misdemeanors. (Stats. 1850, ch. 38, pp. 110-111, §§98-105). Today, in sharp contrast, the Elections Code punishes at least 76 different acts as felonies, in 33 separate sections; at least 60 additional acts are punished as misdemeanors, in 40 separate sections; and 14 more acts are declared to be felony-misdemeanors." [Footnote omitted]. 9 Cal.3d at 215.

[B] The California Supreme Court's decision does not conflict with opinions rendered in other states having different election law histories and statutory schemes. This Court has repeatedly declined to give weight to petitioner's contention that the equal protection clause does not apply to the restriction of

voting rights. It is clear from the Court's decision in *Reynolds v. Sims,* 377 U.S. 533 (1964); *Carrington v. Rash,* 380 U.S. 89 (1965); *Oregon v. Mitchell,* 400 U.S. 112 (1970); and *Dunn v. Blumstein,* 405 U.S. 330 (1972), that before the right to vote may be restricted, "The purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." 405 U.S. at 336. It is even more clear that the Court's phrase "close constitutional scrutiny" does not mean, as the Attorney General has sophistically interpreted it, "utilization of the entire constitution", Petition, page 13. Rather, as recognized by the California Supreme Court, in *Ramirez v. Brown, supra,* it means that under the equal protection clause when a state attempts to restrict the right to vote, it must have a compelling state interest *and* use the least restrictive method available to it. Neither of these requirements have been set forth by the Attorney General to this Court or the Court below. In fact, no rational basis for California's exclusion of respondents and their class from the franchise has ever been presented by the Attorney General.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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DONALD G. GREEN,
SARA E. GREEN,
League of Women Voters
Education Fund,
Of Counsel.

October 1973.

(Appendix Follows)

Appendix

In the Supreme Court of the
State of California

Abran Ramirez, etc.,
Petitioners,
vs.
Edmund G. Brown, Jr., Secretary of State of the State of California, et al.,
Respondents.

HEARING ON PETITION FOR WRIT OF MANDATE

Monday, February 5, 1973

For Petitioners:
Burton D. Fretz, Esq., et al.

For Respondents:
George J. Roth, Esq.,
Deputy Attorney General

Mr. Roth: May it please the Court I represent the Secretary of State in this matter and it's an unusual case because of the nature of the case the Attorney General has an interest in it. However, as indicated by our pleadings our interests are very close together. The Attorney General is particularly careful and

wants to point out to the Court the difference in the pleadings and the Secretary of State has responded in that matter to exclude prisoners from this State who are serving terms or who are on parole. The petitioners have excluded those people from their pleadings and it may be that that is the subject of another lawsuit. We feel very strongly that based on the pleadings in this case at this time there's nothing before the Court relating to prisoners in prison or on parole.

The Court: Mr. Roth that would mean that you would say that the first alternative offered by the Petitioner was one we shouldn't consider then.

Mr. Roth: Well——

The Court: Which he included in his class——

Mr. Roth: Yes. By his pleadings I don't see he can get to that alternative

The Court: However that wouldn't affect his second alternative as I understand it, which would be those that were under conviction, incarcerated or on parole would be——

Mr. Roth: Well, I believe he excludes those. And basically we start with the idea that prisoners in prison and on parole are put there for punishment purposes, but they may be for rehabilitation or punishment, but we start with the idea that somebody is sent to prison as punishment for a crime, hopefully they'll be rehabilitated and during this period one of the punishments is the deprivation of civil rights. We feel very strongly that the State has a compelling interest and also a reasonable relationship to the end to

be achieved. We think we meet all the tests insofar as people in prison or on parole are concerned.

Mr. Roth: We're not talking about people in county jails waiting to be sentenced or serving misdemeanor sentences. Those people can vote. They vote right now, as far as we know. It it's called to our attention, we advise people that prisoners in county jails have a right to vote.

The Court: Mr. Roth, what about the person who is convicted in the trial court and has the matter on appeal? Would he be excluded or not?

Mr. Roth: It's a question of where do you have a judgment? If he's in prison I believe that you have to exclude him, Your Honor, as far as the punishment. He's still serving sentence—it's part of his sentence.

The Court: I'm talking about the man who hasn't gone there.

Mr. Roth: Well, still until he goes to prison I think you have a different problem. Uh——

The Court: It's hard to define, Counsel.

Mr. Roth: Very hard, Your Honor.

The Court: Because frequently, as you well know, the county jails are filled with individuals who have been convicted of felonies and who as a condition of probation may be serving time on the county level.

Mr. Roth: That's true. If it's probation we're talking about, then we feel that that person can vote.

The Court: Now, even though he has been convicted of what at one time might have been thought to be an infamous crime——

Mr. Roth: Well——

The Court: ——a felony, of a certain type.

Mr. Roth: Let me put it this way, Your Honor. That if—the Attorney General, and that means Secretary of State agree in this principle; They agree with the petitioners to this extent. That if the person has been in prison, has served his term in prison and has completed his parole, that possibly except for election code felonies, and really they're de minimus as I understand it—there hasn't been one in many, many years that we know of—but at any rate, that the people who are finished with the particular sentence altogether, that if they should vote is a matter for the Legislature to decide. That's our position. That the Secretary of State's position. The big problem we see here was to try and define in the case the justiciable issue before this Court when we framed our pleadings, because we, I guess, came up with almost an amicus brief that's really asking the Court for declaratory relief, to tell us and to tell everybody in the State what infamous crime means.

The Court: I assume that's because each county has interpreted it differently.

Mr. Roth: I think there's no question that you have the geographical denial of equal protection on that ground. I think we have to admit that. Just based on what the factual situation is at the moment, and it's an unfortunate situation when you get a county, Los Angeles for example, I believe it is, says that somebody who commits statutory rape, they can't vote and somebody commits rape they can, and I suppose the theory is that statutory rape there's some

chicanery or deceit connected with it with a young girl and I talked to the County Counsel's office and I had to write an opinion, the Court's probably familiar with it, it's in 53 Cal. App., it's on the Otsuka case, and frankly I read Otsuka I guess 27 times and I rewrote the opinion 13 times to try and figure out what to say. But, I talked to the County Counsel's office at Los Angeles who has done more research on it than anybody, and I said "How do you come to this conclusion, what is meant by an infamous crime? And they said, well, we feel somebody is charged with possession of marjuana, under the State law, that that's an infamous crime, but if it's under the Federal law it's a tax case and it's really not an infamous crime it's—— (Laughter)

I said, "Well, what do you mean?" And the attorney said to me, well, he said—I said don't you realize as a practical matter when somebody gets sent to Federal Penitentiary on a marijuana deal it a big deal it's not a little deal? And he said, I know, but we have to have some distinction, and I think the distinction they make was just—to me it was too legalistic.

The Court: In view of the State's inability to define an infamous crime, how can it show a compelling interest that those persons allegedly convicted of it should be kept from voting?

Mr. Roth: I——

The Court: In other words, the burden lies with the State, doesn't it?

Mr. Roth: Your Honor, I think the problem is this: That you said in view of the State's inability to define the crime, and I think the problem is that

the crime has not yet been defined. There is inability to define it and whether this Court does it or the Legislature does it, somebody should do it, and I think it can be done and possibly, and I say this with reservations because I'm not sure—I've read the Federal Cases and I've read many of the State cases—and I suppose in certain instances the State may be able to show a compelling State interest in a rational means for the end, if it's defined.

The Court: Of course the Legislature has now had seven years in which to do it.

Mr. Roth: Well——

The Court: Since Otsuka——

Mr. Roth: Well, now—that's true, Your Honor, however they now have the Constitutional mandate to do it, because they didn't have that before. All they had was this Court's suggestions——

The Court: Do you find justice, do you find some significance in the Constitutional change?

Mr. Roth: I think so, Your Honor, very much.

The Court: What significance?

Mr. Roth: Number one, the constitutional change took the word "ever" out which under the old constitution meant, as I read it, that once somebody was convicted of an infamous crime, for ever after they would be disenfranchised unless they in effect has a pardon from the Governor. You pointed out in Otsuka that if they went through a 350 Election Code, 350 rehabilitation proceeding to prove their rehabilitation they could vote. That modified the law somewhat. But it still said forever. That was taken out of the constitution and the constitution now specifi-

cally says the Legislature shall enact laws to or in effect enabling legislating to carry out this policy and I think that the Legislature has this mandate. The Court may not want to wait for the Legislature to do it.

The Court: Well, are you suggesting then that any statutes on the books prior to the constitutional amendment are invalid because not re-enacted?

Mr. Roth: No, no. I believe that what's on the books is enabling legislation. But when you look at the statutes that talk about striking votes for infamous crimes, it's a problem. It's still there, we still have the problem.

The Court: I find it difficult to find any significance in the omission of the word "ever."

Mr. Roth: Well to me that's the most important part of the change, Your Honor.

The Court: It seems to be a matter of semantics. The original constitution provision didn't have the word in and it was subsequently added, and now it's omitted. It looks to me like it's just a semantical——

Mr. Roth: Well, it's hard to tell and it's really to impute the knowledge of what the change meant to the voters because it was done in the Legislature and really this is not legislation but the people voting, it's different and so whether or not we can impute the change to the desire of the people to make the change is questionable, I agree. But you have problems—all we're asking is help from the Court so the people know what infamous crime is.

I'd like to get back again, if I may, to the question of the prisoners in prison or on parole. Because

really that is what interests us, it interests the Secretary of State, it interests the Attorney General more. Now I have a client and I'm his lawyer, and I guess there's a fine line in the lawyer-client relationship that I hopefully trying very delicately but honestly, and within the framework of the Code of Ethics. And the Attorney General is very much interested in being certain that the prisoners in prison and on parole do not vote. There's a tremendous amount of problems. What I'm alluding to, the City of Folsom in order, in the newspapers, get a tax advantage of some time as I understand it, annexed Folsom Prison and it may backfire on them if the prisoners are allowed to vote. But here's what happened—(Laughter)

If the prisoners in Folsom Prison are permitted to vote, then they vote for the City Council of the City of Folsom they will in effect control who the police chief is and under our system of administration of justice in California, the local agencies are the ones who investigate the crimes in the prisons. When a crime occurs in San Quentin the District Attorney's office over in Santa Rosa I guess it is goes in and investigates it. The Sheriff investigates it. And if you had prisoners in San Quentin Prison voting and saying that they're residents of that County they could elect their own sheriff and their own District Attorney, it would be a great thing. You have administrative problems.

The Court: Are they counted in the population in the census polls?

Mr. Roth: I don't think San Quentin is at the moment, but you never know when somebody is going to annex them, Your Honor. They did it in Folsom——

The Court: Well, if they get the benefits why shouldn't they have the detriments?

(Laughter)

Mr. Roth: But the—there's other problems. There's many administrative problems that I can see. For example supposing that this Court was to say that prisoners in prison could exercise their franchise in any election in this State and somebody said—they might say, well they wouldn't have to set up polling booths, they could vote by absentee ballot. Well, I could foresee immediately that question of denial of equal protection, because they would say well the League of Women Voters has no right to come in and present their candidates night in our prison and the candidates can't come through and shake hands with—we don't get to meet the candidates, we don't have the same knowledge that the rest of the voting population has.

The Court: Mr. Roth, isn't this really a straw man that you're building up here? The members—the Petitioners here are not prisoners and the class of which they are members do not include prisoners or parolees, they're all out, they served their time, one of them 18 years ago——

Mr. Roth: Your Honor, that's the greatest thing I've heard today. Because as long as the Court feels that way, I'll stop.

The Court: Well, I'm not thinking for any of my colleagues——

Mr. Roth: If the Court has any further questions.

The Court: I think not. Thank you.

Mr. Roth: Thank you, Your Honor.